

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER OF certain rules, policies and agreements relating to the multiple listing service of the Toronto Real Estate Board.

BETWEEN:

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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CT-2011-003

Andrée Bernier for / pour

REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

395

COMMISSIONER OF COMPETITION

Applicant

- and -

THE TORONTO REAL ESTATE BOARD

Respondent

- and -

THE CANADIAN REAL ESTATE ASSOCIATION

Intervenor

REMEDY SUBMISSIONS OF THE COMMISSIONER OF COMPETITION

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Overview¹

1. The Tribunal found that TREB had intentionally restricted VOWs and thereby had substantially prevented competition. In fashioning an order, the Tribunal's objective is to restore competition and overcome the effects of TREB's anti-competitive practice.

2. To do so, the Commissioner proposes prohibition and mandatory orders to end TREB's restrictive practices, to restore competition by ensuring a complete VOW Data Feed, and to keep TREB from reversing course on VOWs or otherwise undermining the effectiveness of the Tribunal's order.

- (a) **TREB shall not exclude the Disputed Data from the VOW Data Feed.**
- (b) **TREB shall not preclude or restrict² its Members' use of the information in the VOW Data Feed, but TREB may limit Members' use to being directly related to the business of residential real estate.³**
- (c) **TREB shall not preclude or restrict its Members' display on their VOWs of the information in the VOW Data Feed, including the Disputed Data, except**

¹ Capitalized terms are defined in the Tribunal's Reasons for Order and Order dated April 27, 2016 ("**Reasons**").

² The Tribunal used the phrase "preclude or restrict" in its order prohibiting Nielsen's exclusionary practices. See paragraphs 2(1) and 3(1) in the Consolidated Order dated August 30, 1995 in *The Director of Investigation and Research v. The D & B Companies of Canada Ltd.*, CT – 1994/001.

³ The Commissioner has never sought permission for Members to use the information for any other purpose. See November 2, 2015 Transcript p. 1379-1380 and 2012 Closing Submissions para 756. The "business of residential real estate" and "real estate business" are the phrases used in TREB's AUA regarding restrictions on use of MLS information: Exhibit R-039, Witness Statement of Donald Richardson dated July 27, 2012, p. 175.

for the seller's name and any lock-box codes or similar home security information.⁴

- (d) TREB shall continue to make available the VOW Data Feed to Members and AVPs which shall not in any respect be inferior to the VOW Data Feed existing as of the date of this Order.**
- (e) TREB shall include in the VOW Data Feed all MLS information that is or becomes available to Members through Stratus (or any other means used to provide MLS information to Members).**
- (f) TREB shall make available MLS information in the VOW Data Feed no less frequently than TREB makes MLS information available to Members through Stratus (or any other means used to provide MLS information to Members).**
- (g) TREB shall provide the VOW Data Feed on terms and conditions that are consistent with this Order and are no more onerous or restrictive in any respect than those that apply or are in force as of the date of this Order.**
- (h) TREB shall provide the VOW Data Feed on terms and conditions and with technical characteristics that are as least as favourable as those that apply to**

⁴ The Commissioner has never taken the position that Members must be able to display an individual seller's name or the code to a lock-box which contains a key to the property (or other security information, such as when an owner will not be home). Such information should be in the VOW Data Feed for internal use purposes, but the Commissioner takes no position on the issue if TREB wishes to preclude or restrict its display. See November 2, 2015 Transcript p. 1380. The Commissioner is not taking the position that conditional sold prices need to be displayed (they are not in the MLS in any event). The Commissioner's submissions on the display of conditional sold data begin at paragraph 31 below.

other platforms or services developed, operated or supported by TREB that provide the Disputed Data to Members' clients or customers.

- (i) **TREB shall provide the Commissioner 60 days' written notice of any proposed change to its MLS Rules and Policies, agreements, or practices concerning VOWs.**

3. The Commissioner submits that these terms enable innovation and dynamic competition and promise Members the freedom to "compete by offering whatever innovative services they deem appropriate, without any bias in favour or against full-information VOWs."⁵ The terms are clear, enforceable, consistent with past Tribunal orders, and grounded in the Tribunal's findings of fact and in the evidence. They are necessary to overcome the effects of TREB's practice, now into at least its fifth year.

Legal Framework

4. Subsection 79(1) permits the Tribunal to "make an order prohibiting [the respondent] from engaging in that practice [of anti-competitive acts]." Where the Tribunal finds that an order under subsection (1) is not likely to restore competition to the market, subsection 79(2) permits the Tribunal to "make an order directing [the respondent] to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market."

⁵ Reasons, para 778.

5. The Tribunal has described the objective of its orders as being to "restore competition"⁶ and to "overcome the effects of such practices as may have already occurred."⁷ In *Laidlaw*, the Tribunal described the context in which its assessment occurs:

What is necessary to restore competition is a judgment which must be made by reference to the evidence which has been put before the Tribunal as to how the markets in question operate and have operated and the effects the anti-competitive acts are having thereon.⁸

6. To overcome the effects of the anti-competitive acts, the Tribunal has typically issued orders that blend prohibitions with mandatory orders. In each of *Laidlaw*, *D&B*, and *Tele-Direct*,⁹ restoring competition required an order that substantially moved the market towards the position it would have been in "but for" the respondent's conduct. This is most apparent in *D&B* where the Tribunal not only prohibited Nielsen's exclusionary practices¹⁰ but required Nielsen to provide IRI access to historical scanner data so that IRI could develop competitive products to Nielsen's. The Tribunal held that such an order was "essential to restore competition in the market."¹¹ Had Nielsen not engaged in a practice of anti-competitive acts, IRI would have had

⁶ *Canada (Director of Investigation and Research, Competition Act) v. Laidlaw Waste Systems Ltd.*, [1992] CCTD No 1, at 46 ("*Laidlaw*") and *Canada (Competition Act, Director of Investigation and Research) v. The D & B Companies of Canada Ltd.*, [1995] CCTD No 20 at 44 ("*D&B*"),

⁷ *Director of Investigation and Research v. NutraSweet* (1990), 32 CPR (3d) 1 at 57 ("*NutraSweet*"). See also *D&B* at 50: "Since we are proceeding under subsection 79(2) regarding manufacturer contracts, this means an order that in our opinion will "overcome the effects of the practice" in the market. We would be remiss, given the concerns expressed above, if we did not attempt to fashion an order which deals with those concerns."

⁸ *Laidlaw* at 46.

⁹ In *Laidlaw* and *Tele-Direct*, the restorative exercise was considered in the context of acts that had lessened the existing competition each respondent faced in their respective markets. In *D&B*, competition in Canada for scanner-based market tracking services had yet to emerge (*i.e.*, had been prevented) because Nielsen's conduct had excluded IRI from the market.

¹⁰ Nielsen's exclusive supply agreements had prohibited suppliers from supplying data to IRI. The Tribunal prohibited Nielsen from entering "into a contract which precludes or restricts a supplier of retailer scanner data from providing a supplier or potential supplier of a scanner-based market tracking service with access to scanner data or causal data necessary for the provision of that service."

¹¹ *D&B* at 50.

access to scanner data from retailers long before the Tribunal's order. By requiring Nielsen to provide 15 months of historical scanner data, the Tribunal went some way to putting IRI in the position it would have been in "but for" Nielsen's conduct and ensuring that Nielsen's past practices did not have the ongoing effect of keeping IRI out of the market. The mandatory order was the most effective and appropriate way to restore competition and "overcome the effects" of Nielsen's anti-competitive conduct.

7. In *Tele-Direct*, overcoming the effects of Tele-Direct's discriminatory practices required imposing a positive obligation on Tele-Direct to treat customers of consultants no differently than customers who did not use consultants.¹²

The Tribunal's Findings regarding the Market and the Effects of TREB's Conduct

8. The Tribunal's findings about the market and the anti-competitive effects of TREB's conduct are the context in which the Tribunal assesses what is necessary to restore competition to the GTA.

a) TREB has Substantial Market Power

9. The Tribunal found that TREB controls the market for the supply of MLS-based residential real estate brokerage services because it controls the MLS and how its Members compete through its rule-making ability.¹³ TREB's market power is substantial and it has the incentive to use that market power for the benefit of its Members (or some of them) as they provide residential real estate brokerage services to home buyers and sellers. The Tribunal

¹² *Canada (Competition Act, Director of Investigation and Research) v Tele-Direct (Publications) Inc.*, [1997] CCTD No 8 at para 761 ("*Tele-Direct*"): "The practice of these acts is prohibited. Customers using consultants must be treated by Tele-Direct no differently than customers who do not use consultants."

¹³ Reasons, para 253.

agreed with Dr. Vistnes' observation that TREB's conduct can be expected to mimic its members' collective preferences.¹⁴ In this instance, TREB exercised that market power for the benefit of its traditional Members to the disadvantage of its Members who wish to compete using VOWs.

b) TREB's Practice of Anti-Competitive Acts: the VOW Restrictions

10. Using its substantial market power, TREB adopted the VOW Restrictions, which the Tribunal described in the most detail at paragraph 320 of its Reasons:¹⁵

- (a) The exclusion of the Disputed Data from TREB's VOW Data Feed;
- (b) Provisions in TREB's VOW Policy and Rules that prohibit Members who want to provide services through a VOW from using the information included in the VOW Data Feed for any purpose other than display on a website; and
- (c) Prohibiting TREB's Members from displaying certain information, including the Disputed Data, on their VOWs.¹⁶

11. The Tribunal rejected TREB's argument that privacy considerations motivated the VOW Restrictions.¹⁷ The Tribunal found that through the VOW Restrictions, TREB had intentionally discriminated and continued to discriminate against VOW operators to insulate its members from

¹⁴ Reasons, para 269.

¹⁵ And stated these acts were anti-competitive in paragraph 322 of its Reasons.

¹⁶ The Tribunal noted that this last prohibition "is reinforced by terms in TREB's Data Feed Agreement that limit the use of the MLS data in the VOW Data Feed to a purpose that is narrower than the corresponding provision in the AUA that applies to Members using the Stratus system. Among other things, the Commissioner maintains that those terms severely restrict the ability of VOW operators to use certain MLS data to improve the efficiency of their operations and to provide enhanced services to their customers and clients through their VOWs."

¹⁷ Reasons, para 321.

competition from new entrants and Members using VOWs.¹⁸ In so doing, TREB had "substantially distorted the competitive process".¹⁹

c) The Substantial Prevention of Competition arising from the VOW Restrictions

12. In paragraphs 505 to 619 of its Reasons, the Tribunal identified five effects of TREB's anti-competitive conduct which, in the aggregate, it found demonstrated that TREB had substantially prevented competition. These effects were: (i) increased barriers to entry for VOW-based brokerages; (ii) increased costs for VOW-based brokerages; (iii) reduced range of services offered to GTA home buyers and sellers; (iv) reduced quality of services offered to GTA home buyers and sellers; and (v) reduced innovation.

13. These effects were caused by the VOW Restrictions which, among other things, prohibited TREB's Members from displaying the Disputed Data on their VOWs and from using any of the information in the VOW Data Feed except for the limited purpose of display on a website (which prohibition kept them from using the information internally and from creating consumer-facing products).

14. Throughout its Reasons, the Tribunal repeated how prohibitions on display and use resulted in each of the five effects caused by TREB's anti-competitive conduct.

15. Regarding display, the Tribunal's findings included that:

¹⁸ Reasons, para 390, 440, 709 and 712. See also Reasons, para 563 "The Tribunal also accepts Dr. Vistnes' evidence that the VOW Restrictions discriminate against full-information VOW operators..."

¹⁹ Reasons, para 712.

- (a) Viewpoint was unlikely to enter the GTA without the ability to display the Disputed Data on its VOW.²⁰ Display was similarly relevant to Redfin's decision regarding potential expansion into Canada.²¹
- (b) To compete, VOWs must offer more than what is available through other websites, such as realtor.ca.²² If they could do so, VOWs would empower buyers and sellers to do more of the work, which assists the brokerage in becoming more efficient.²³
- (c) Display of the Disputed Data on a VOW may be more timely and complete than other delivery mechanisms making VOW display particularly valuable and attractive to home buyers and sellers.²⁴ Where the Disputed Data is displayed, it produces significant website activity.²⁵

16. Regarding use of the information in the VOW Data Feed (both for internal use and to develop consumer-facing products), the Tribunal's findings include that:

- (a) Members would develop internal tools to save agents time,²⁶ improve the quality of services offered to home buyers and sellers,²⁷ streamline certain aspects of their businesses,²⁸ and reduce costs.

²⁰ Reasons, para 512.

²¹ Reasons, para 533.

²² Reasons, para 544.

²³ Reasons, para 557.

²⁴ Reasons, para 590.

²⁵ Reasons, para 595.

²⁶ Such as automated CMAs (Reasons, paras 555-557) and the assembly and display of listing information (Reasons, paras 558-559).

- (b) Members would develop consumer-facing products such as heat maps, graphs, charts;²⁹ more accurate price trend analyses;³⁰ innovative price trend and comparable home tools;³¹ statistical neighbourhood analyses, listing price history and automatic property valuations.³²

d) Members Must Be Able to Display, Use, and Innovate

17. Accordingly, to overcome the effects found by the Tribunal to have substantially prevented competition and thereby restore competition, an order must enable TREB's Members to display the Disputed Data to home buyers and sellers on their VOWs, whatever medium is used to access the VOW (*e.g.*, a computer, a mobile device, etc.)³³ and to use information in the VOW Data Feed (including the Disputed Data) for internal purposes and the creation of consumer-facing products. Both are prerequisites to Members' ability to innovate along the lines discussed by the Tribunal in its Reasons.

18. Before Members can display and use the Disputed Data, they must have it through the VOW Data Feed. As the Tribunal found, among other things, without the Disputed Data in the VOW Data Feed, use of the Disputed Data and display on a VOW is more costly and prone to error than otherwise.³⁴ As a practical matter, without the Disputed Data and other information

²⁷ Such as by freeing agents up to focus on high value-add services (Reasons, para 559).

²⁸ Such as sophisticated analysis of agents' performance metrics (Reasons, para 582), showing and booking tools (Reasons, para 574), and automated trade accounting tools (Reasons, para 609).

²⁹ Reasons, para 577.

³⁰ Reasons, para 579.

³¹ Reasons, para 579.

³² Reasons, para 582.

³³ Mr. Syrianos, for example, testified about using the VOW Data Feed for his brokerage's mobile app: Reasons, para 604.

³⁴ Reasons, paras 239, 405, 554, 558, and 560.

from the MLS Database in the VOW Data Feed, an order permitting Members to display and use the Disputed Data will be ineffective.

Proposed Order

a) Prohibition Orders under Subsection 79(1) are Necessary and Appropriate

19. Orders under subsection 79(1) to prohibit the VOW Restrictions are necessary and appropriate to enable Members to display, use and innovate using the Disputed Data and the information in the VOW Data Feed.

20. The Commissioner proposes the three terms at paragraphs 2(a), 2(b) and 2(c) that prohibit TREB from:

- (a) excluding the Disputed Data from the VOW Data Feed;
- (b) precluding or restricting Members' use of the information in the VOW Data Feed;
and
- (c) precluding or restricting Members' display of the information in the VOW Data Feed.

21. These three prohibitions directly address TREB's three anti-competitive acts as found by the Tribunal. They are clear, enforceable and consistent with past Tribunal orders. For example, the Tribunal used the phrase "preclude or restrict" in its order prohibiting Nielsen's exclusionary practices.³⁵ These prohibitions also have the salutary effect of prohibiting enforcement of the discriminatory terms of TREB's VOW Policy and Rules and its VOW Data Feed Agreement

³⁵ See paragraphs 2(1) and 3(1) in the Consolidated Order dated August 30, 1995 in *The Director of Investigation and Research v. The D & B Companies of Canada Ltd.*, CT – 1994/001.

without requiring the Tribunal to specifically address each of the offending provisions in its order.³⁶

b) Mandatory Orders under Subsection 79(2) are Necessary to Restore Competition and Overcome the Effects of TREB's Anti-Competitive Conduct

22. In 2012 and 2015, the Commissioner submitted that orders under subsection 79(2) were necessary to require TREB to include all the MLS listing information, including the Disputed Data, in the VOW Data Feed³⁷ and to prevent TREB from reversing course on VOWs more generally.

23. Without such orders, TREB could render the Tribunal's order ineffective. Because it controls the MLS and can impose rules on its Members, TREB remains able to significantly disadvantage VOW operators relative to other Members. For example, TREB could remove some of the currently available information about Available listings from the VOW Data Feed, could update information in the VOW Data Feed infrequently, could reduce download speeds, could terminate the VOW Data Feed altogether or could change its rules to require Members (or sellers and buyers) to "opt in" to having their listings displayed on VOWs (*i.e.*, make VOWS as limited as IDXs).

24. Such actions would eviscerate any order regarding display and use and run contrary to the Tribunal's findings that VOWs represent an important new way for Members to compete, to

³⁶ VOW Rule 823 a), b), e); VOW Policy 15, 17, 22 d), and 24 a), b), c); VOW Data Feed Agreement sections 3.2, 4.1, 5.1 and 6.2(i).

³⁷ 2012 Closing Submissions para 754 and 2015 Closing Submissions paras 209(b)-210. During his 2015 oral closing submissions, the Commissioner's counsel explained that including all available information in the VOW Data Feed is critical. Among other reasons, information such as sold price is only useful in combination with the other fields in the listing which describe the property's features. To the extent the Disputed Data as defined by the Tribunal could be interpreted to exclude other fields which are part of, for example, the sold listing as distinct from the sold price, the order needs to be broader than just the Disputed Data.

better serve home buyers and sellers, and to innovate in the GTA. Given the Tribunal's findings about TREB's subjective intent to exclude competition from VOWs,³⁸ this concern is not speculative and derives directly from the Tribunal's findings of fact and the evidence.

25. The Commissioner proposes the six terms in paragraphs 2(d), 2(e), 2(f), 2(g), 2(h) and 2(i) to ensure that TREB does not reverse course on VOWs by providing an inferior VOW Data Feed or ceasing to provide one altogether, by providing different MLS information to Members through the VOW Data Feed as compared to provision through Stratus, by making the terms and conditions on which it offers the VOW Data Feed more onerous or restrictive, or by favouring competitive products over VOWs.

26. The provision in paragraph 2(d) requiring TREB to maintain the VOW Data Feed ensures that the VOW Data Feed will continue as it does today: as an electronic connection over the Internet between a Member's website and TREB's MLS third party database that permits Members to download information in raw data format to their servers.³⁹ The technical characteristics of the VOW Data Feed, such as download speeds, should not deteriorate. Improvements should be permitted.

27. The provisions in paragraphs 2(e) and 2(f) requiring that the information content and frequency of updates to the VOW Data Feed mirror that of Stratus is comparable to the Tribunal's directive to Tele-Direct that it treat customers of consultants no differently than other customers.⁴⁰ Here, the order would require TREB to provide the same information to Members

³⁸ Reasons, paras 322 (and following) & 429-431.

³⁹ Reasons, para 96 and Exhibit R-039 Witness Statement of Donald Richardson, paras 165-169.

⁴⁰ *Tele-Direct*, para 761 (emphasis added). "The practice of these acts is prohibited. **Customers using consultants must be treated by Tele-Direct no differently than customers who do not use consultants.**"

at the same time in as efficient of a manner through the VOW Data Feed as it is provided to Members through Stratus (whether regarding Available or Unavailable listings).⁴¹ In other words, it would require TREB to treat its Members no differently in terms of the information it makes available to them through each delivery mechanism, and that other delivery mechanism would not be advantaged over the VOW Data Feed.

28. Paragraph 2(g) ensures that TREB will amend its MLS Policies and Rules and agreements related to VOWs as necessary to comply with the order. They also ensure that TREB does not make terms and conditions applicable to VOWs, like the registration requirement, more onerous than they are today. This recognizes that the Commissioner has not taken issue with some aspects of TREB's current VOW Policies and Rules, such as the registration and sign-in requirement for information about identifiable properties.⁴²

29. The requirement in paragraph 2(h) recognizes that TREB has developed products, such as Collaborate, which may compete with VOWs.⁴³ TREB has an incentive and the ability to favour its products over that of some Members. For example, TREB could favour Collaborate by displaying the Disputed Data to home buyers and sellers without registration or sign-in. If that happens, VOWs should operate under the same rules, which paragraph 2(h) strives to achieve.

⁴¹ To be clear, the Commissioner is not suggesting TREB put Teranet's or MPAC's information in the VOW Data Feed. The Commissioner understands that Members have access to a portal on TREB's intranet through which they can access such information directly from Teranet or MPAC, not from TREB.

⁴² With respect to derivative products which include only aggregate, anonymous information, there does seem to be any reason why registration would be required. TREB's MarketWatch reports, which include average price information but do not include information about identifiable properties, are available on TREB's non-password protected website.

⁴³ Similar to how Tele-Direct remained able to significantly disadvantage customers of consultants through its control of the Yellow Pages. Mr. Richardson testified that TREB's Collaborate "allows clients to collaboratively search active property listings": Exhibit R-141 Updated Witness Statement of Donald Richardson, para 57.3.

30. Finally, the provision in paragraph 2(i) requiring TREB to notify the Commissioner in advance of changes related to VOWs supports compliance with and enforceability of the order.

Conditional Sold Prices

31. In paragraph 779 of its Reasons, the Tribunal expressed concern about including conditional solds data in the VOW Data Feed. The Commissioner does not insist that TREB include the sale price of a conditional sold in the VOW Data Feed. The agreed sale price of a conditional sold is not available to Members through Stratus.⁴⁴ TREB need only include the agreed sale price in the VOW Data Feed when a conditionally sold property changes status to a firm sale (meaning that conditions precedent have been met or waived), at which point the sale price is uploaded to the MLS,⁴⁵ and is available to members through Stratus. That will ensure no prejudice to the seller if the conditional sold never becomes a firm sold because buyers will not have access to the seller's reservation price.

32. Because the sale price of a conditional sold property is not available to Members through Stratus and, thus, would not be included in the VOW Data Feed, it does not appear necessary to refer specifically to conditional sold prices in the terms of the order.

33. Distinct from the sale price of a conditional sold, however, is the fact of whether a property has sold, conditionally or unconditionally. The Tribunal found that this is very relevant information to customers⁴⁶ and the fact of a change in status is available to TREB members

⁴⁴ Reasons, para 76.

⁴⁵ Reasons, para 77.

⁴⁶ Reasons, paras 679 and 682.

through Stratus.⁴⁷ For this reason, the fact of sale even on a conditional basis should be included in the listing information in VOW Data Feed, although the sale price need not be.

34. To the extent that a similar concern about prejudice to sellers arises in the rare situation where a firm sale fails to close, the agreed sale price can be removed from the VOW Data Feed (if it is similarly not available for display to members through Stratus).

35. MLS Rule 616 requires members to update the listing's status if a firm sale falls through,⁴⁸ so TREB has the ability to take steps to ensure in those rare situations that the seller's reserve price is not disclosed to and relied on by potential buyers. For example, if the deal falls through, the agreed sale price could be removed from the VOW Data Feed.

36. Given the Tribunal's findings and the evidence about the importance of "pending sold" prices more generally, firm sale prices should be included in the VOW Data Feed until the deal actually falls through and is reported as such through Stratus. That will remove the potential prejudice to sellers and ensure that some of the most important information remains available in the VOW Data Feed.

⁴⁷ Reasons, para 77.

⁴⁸ Exhibit R-039, Witness Statement of Donald Richardson dated July 27, 2012, p. 156: "If a firm sale falls through, or a conditional Offer does not become a firm sale, the Listing Brokerage shall Report such event to TREB within two (2) TREB business days of the happening of the event."

ALL OF WHICH IS RESPECTFULLY SUBMITTED


May 25, 2016


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DEPARTMENT OF JUSTICE CANADA



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